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Commercial Acquisitions and Best Value

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Overview

- Background
- Commercial Definition FAR 2.101
- Acquisition Strategy
- Applicability
- Conclusion

Background

- Law requires commercial solutions
- Commercial item definition can be found in FAR 2.101
- Commercial solutions are coupled with market research
- Multi-functional approach
- Commercial acquisitions are negotiable

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Background

- DoD cannot maintain unique industry
  - Declining Defense Budgets
- We must learn to use commercial markets
  - Expand supplier pool
- Commercial Markets Issues
  - FAR Part 12
  - Access to latest technology
  - Reduced Data
  - Market Leverage

Commercial Definition Paragraph (1)

- FAR 2.101: Commercial Item means --

  (1) Any item, *other than real property*, that is of a type customarily used for non- governmental purposes and that --

  (i) Has been sold, leased, or licensed to the general public;

  or,

  (ii) Has been offered for sale, lease, or license to the general public;

Not everything is commercial!

Commercial Definition Paragraph (2)

- FAR 2.101(2): Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

Commercial Definition Paragraph (3)

- FAR 2.101(3): Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for --

  (i) Modifications of a type customarily available in the commercial marketplace;

  or

  (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet federal government requirements...

Commercial Definition Paragraph (4)

- FAR 2.101(4): Any combination of items meeting the requirements of paragraphs (1), (2), (3) or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

Commercial Definition Paragraph (5)

- FAR 2.101(5): Installation services, maintenance services, repair services, training services, and other services if--
  - (i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and
  - (ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government

Commercial Definition Paragraph (6)

- FAR 2.101(6): Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based upon established catalog or market prices for specific tasks performed under standard commercial terms and conditions…
- Contract type must be FFP, FFP/EPA or FFP/LOE by statute
  - No Time & Material, Labor Hour or Cost type contracts allowed

Commercial Definition Paragraph (7)

- FAR 2.101(7): Any item, combination of items, or services referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor

Commercial Definition Paragraph (8)

- FAR 2.101(8): A non-developmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.
- Biotechnology Supplies/Services for use to facilitate defense against terrorism/biological attack

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Acquisition Strategy

- Authorized Contract Types for Commercial Items
  - Firm-fixed-price contracts,
  - Fixed-price contracts with economic price adjustment (FP/EPA),
  - or FFP-LOE
  - Award fee can be used if not based on cost
- Use of Indefinite-delivery Contract Strategy
  - Time and Material or Labor Hour may be the basis in the commercial market
  - Use of fixed hour rates and labor categories on the basic with resultant DO or TO a FFP, FP/EPA and/or FFP-LOE
- Cost Contracts are prohibited

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Acquisition Strategy

- Get all stakeholders together early to:
  - Discuss requirement
    - → Clarify requirement
    - → Commercial or non-commercial
    - → Advantages and drawbacks
    - → Get buy-in and consensus
    - → Identify constraints
  - Determine how to perform market research
    - → Techniques
    - → Tools
    - → Assessment

Acquisition Strategy

- Simplified & Sealed Bid
- Best Value Source Selections
  - Lowest Price/Technically Acceptable (LPTA)
    - → Technically Acceptable
    - → Lowest Price among Technically Acceptable
  - Performance/Price Tradeoff (PPT)
    - → Technically Acceptable
    - → Trade-off between Past Performance and Price
  - Full Trade-Off (FTO)
    - → Trade-off between all four Factors
      - Past Performance, Mission Capability, Proposal Risk, Cost/Price

Acquisition Strategy

- Commercial items acquisition used in conjunction with:
  - FAR Part 13 - Simplified Procedures
  - FAR Part 14 - Sealed Bidding
  - FAR Part 15 - Negotiation
- Relationship of FAR Part 12 Parts 13, 14, and 15
  - All of the following can be used with Commercial Acquisitions:
    - Oral solicitations
    - Requests for quotations
    - Purchase orders
    - Invitations for bids, and
    - Requests for proposals
- Terms and conditions tailored to reflect the acquisition

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Acquisition Strategy

- Two Categories for Services under Commercial Contracting
  - First category consists of services that:
    - → Are provided in support of a commercial item.
    - → Come from a source that provides similar services to the general public
  - Second category consists of services that:
    - → Are Stand-Alone Services
    - → Have Government unique requirements or terms and conditions
    - → The Established market price is not published or written

Acquisition Strategy

- CO shall use SF1449, if
  - Acquisition is expected to exceed simplified acquisition threshold (SAT)
  - A paper solicitation or contract is being issued
  - Procedures at FAR 12.603 are not being used (combined synopsis/solicitation procedure)
  - Use of SF1449 is non-mandatory but encouraged for commercial acquisitions not exceeding SAT
- Uniform contract format – not mandatory
  - CLINS, Schedule, clauses, etc. set forth in addenda to SF 1449 (FAR 12.303)

Acquisition Strategy

- Contracts for commercial buys shall include when practicable only clauses that
  - Implement law, regulation, or Executive Order, or
  - Are consistent with customary commercial practices
  - Terms and conditions tailored to reflect the acquisition
  - Clauses not customary within the industry require a FAR Waiver
- CO authorized to develop other provisions as long as they are customary in the marketplace
- Quality Assurance
  - Reliance on Contractor's QC System
  - In-Process inspection permitted only if consistent with Commercial Practice
- In case of conflict, FAR Part 12 Policy governs

Acquisition Strategy

- Tailoring of provisions required by Part 12 that are not based on statute:
  - May be done if consistent with the Marketplace
  - Market research indicates appropriateness of the tailoring
  - Not precluded by law or executive order
  - PCO makes the determination why the tailoring is necessary
  - Provision not required by Part 12 May also be added, if needed

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Acquisition Strategy

- FAR provides three solicitation provisions and two contract provisions
  - FAR 52.212-1, Instructions to Offerors
    - Mandatory
    - Concise set of instructions
    - C.O. may tailor
      - By addenda to the solicitation and contract
      - Indicate in Block 27a of the SF1449 if addenda are attached
    - Offerors may provide multiple offers

Acquisition Strategy

- FAR 52.212-2 Evaluation -- Commercial Items -- When the use of evaluation factors is appropriate, the CO may
  - Insert the provision at 52.212-2, Evaluation – Commercial Items, in solicitations for commercial items or
  - Include a similar provision containing all evaluation factors required by 13.106, Subpart 14.2, or Subpart 15.3 as an addendum
  - Tailor to your solicitation

Acquisition Strategy

- FAR 52.212-3 Offeror Certifications and Representations
  - → Required provision contains all Part 12 Certifications
  - → Can not be tailored, except as provided in FAR 1.4
  - → Certifications have been streamlined

- FAR 52.212-4 Contract Terms and Conditions
  - → Portions May be tailored by C.O. (per FAR 12.302)
  - → Drafted using Copies of Commercial Contracts

Acquisition Strategy

- FAR 52.212-4 Contract Terms and Conditions Clauses that **shall not** be tailored:
  - Assignments
  - Disputes
  - Payment (except as provided in Subpart 32.11)
  - Invoice
  - Other compliances; and
  - Compliance with laws unique to Government contracts

Acquisition Strategy

- FAR 52.212-4 Contract Terms and Conditions Clauses that **may** be tailored by the CO (Per FAR 12.302)
  - Inspection/Acceptance
  - Changes
  - Excusable Delays
  - Patent Indemnity
  - Risk of Loss
  - Taxes
  - Termination for Convenience
  - Termination for Cause
  - Title
  - Warranty
  - Limitation of Liability
  - Order of Precedence

Acquisition Strategy

- FAR 52.212-4 Contract Terms and Conditions permits the Government to terminate for convenience of the Government or for cause
  - Part 49 does not apply but may be used as guidance as long as it does not conflict with this section and language of the clause
  - For purchase orders issued under FAR 13 signed by the contractor, see FAR 13.302-4, which refers you to FAR 12.403(d), termination for convenience

Acquisition Strategy

- FAR 52.212-4 Contract Terms and Conditions clauses that are automatically included:
  - 52.202-1 Definitions
  - 52-203-7 Anti-kickback Act
  - 52.204-7 CCR
  - 52.232-25 Prompt Payment
  - 52.233-1 Disputes
  - Includes provision for Inspection/Acceptance
  - Includes provisions for Termination for Convenience and Termination for Cause

Acquisition Strategy

- FAR 52.212-4 Contract Terms and Conditions -- need to add the following clauses:
  - 52.203-6 Alt I Restrictions on Subcontractor Sales to the Government
  - 52-204-4 Printed or Copied Double-Sided on Recycled Paper
  - 52.204-9 Personal Identity Verification of Contractor Personnel
  - 52.211-6 Brand Name or Equal (if applicable)

Acquisition Strategy

- FAR 52.212-4 Contract Terms and Conditions -- **DO NOT** add the following clauses:
  - 52-203-5 Covenant Against Contingent Fees
  - 52.203-8 Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity
  - 52.203-10 Price or Fee Adjustment for Illegal or Improper Activity
  - 52.204-3 Taxpayer Identification
  - 52.211-5 Material Requirements
  - 52.213-2 Invoices
  - 52.222-20 Walsh Healey Public Contracts Act
  - 52.222-50 Combating Trafficking in Persons
  - 52.223-6 Drug-Free Workplace

Acquisition Strategy

- FAR 52.212-5 Terms and Conditions Required to Implement Statutes or Executive Orders
  - C.O. indicates which of the listed laws is applicable to the procurement
  - Automatically includes—Do not add separately
    - →52.233-3 Protest After Award
    - →52.233-4 Applicable Law for Breach of Contract Claim

Acquisition Strategy

- Check the following for applicability:
  - DFARS 252.225-7000, Buy American Act—Balance of Payments Program Certificate
  - DFARS 252.225-7020, Trade Agreements Certificate
  - DFARS 252.225-7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate
  - DFARS 252.212-7000 Offeror Representations and Certifications—Commercial Items (exceeding SAT threshold)
  - DFARS 252-212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items

Acquisition Strategy

- Check the following for applicability:
  - DFARS 252.209-7001, Disclosure of Ownership or Control of a Terrorist Country
  - DFARS 252.232-7009, Mandatory Payment by Government-wide Commercial Purchase Card
  - DFARS 252.211-7003, Item Identification and Valuation
  - DFARS 252.225-7040 Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States
  - DFARS 252.225-7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States
  - DFARS 252.211-7006, Radio Frequency Identification

Acquisition Strategy

- Timelines
  - Combined synopsis and solicitation do not require a separate synopsis 15 days prior to issuance of the solicitation as they are issued simultaneously
    - → Response times established IAW FAR 5.203 (b) and (h)
  - CO may allow fewer than 30 days response time for receipt of offers for commercial items unless
    - → The acquisition is covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement
- No change to requirement for Business and Contract Clearance for commercial acquisitions
- Documentation Requirements
  - AP or SASS, P-PNM and PNM, SSSR or PAR w/ SSDD still apply if applicable to the acquisition

Applicability

- FAR Part 12 does not apply to the following:
  - At or below the micro-purchase threshold
  - Using the Standard Form 44
  - Using the imprest fund
  - Using the Government-wide commercial purchase card
  - Directly from another Federal agency
- FAR 12.102(f)(1) allows CO to treat any Acquisition as commercial if HCA determines it is to facilitate defense or recovery from NBC or Radiological attack
  - A sole source contract greater than $16M awarded as commercial under this authority but not meeting the definition in 2.101 is not exempt from:
    - → Cost Accounting Standards
    - → Cost or pricing data requirements

Applicability

- FAR 12.102(g)(1) allows CO to use for any acquisition for services that don't meet the definition in 2.101 if the contract:
  - Is entered into on or before November 24, 2013;
  - Has a value of $27 million or less
  - Meets the definition of performance-based acquisition at FAR 2.101
  - Uses a quality assurance surveillance plan
  - Includes performance incentives where appropriate
  - Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved and
  - Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order
- Under this authority, CO may tailor paragraph (a) of 52.212-4 to ensure the contract's remedies adequately protect the Government

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Summary of FAR Part 12

- Provides for government acquisition of commercial items and services
- Procedures used when commercial item/service exists/minor modification
- Advantages
  - Reduces number and simplifies required FAR Clauses
  - Reduces Government costs
  - Reduces acquisition and delivery lead times
  - Opens government procurement to non-defense contractors
  - Leverages commercial marketplace items and innovations
- Disadvantages
  - Contract type limited
  - Minimal government program insight
  - Commercial items may not meet government unique requirements

Conclusion

- We all need to understand how to use commercial methods
- Market Research is the KEY to commercial item buying
- Provides a streamlined approach to acquisition

Commercial Contracting is here to stay!